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No. 92-382

In The

Supreme Court of the United States

October Term, 1992

VICTOR ARDITTI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY TO GOVERNMENT'S BRIEF IN OPPOSITION

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INTRODUCTION

In urging this Court to deny Petitioner's writ, the Government sets forth a substantial misstatement of the record in this case. Counsel, apparently rather than having reviewed the record, has repeated the many blatant misstatements of facts that appeared in the Government's brief in the lower court. There is no question of misconstruing the evidence: with the exception of a portion of one meeting, every meeting between the agent and Petitioner was taped. The Government has simply misstated the evidence that appears on the tapes that it introduced at trial.

Mr. Arditti believes that this Court's decision in *Jacobson v. United States*, 112 S.Ct. 1535 (1992), has an impact on this case, such that had the lower court had the benefit of that decision, it would have reversed Mr. Arditti's conviction. Because the evidence is so important to the Court's decision whether to grant the writ, Petitioner has corrected the substantial misstatements of fact in the Government's brief.

The Government's legal arguments are faulty as well. The Government argues that the holding in *Jacobson* would not have altered the decision of the court below because the law already required evidence of predisposition prior to contact by Government agents. The Government does not, and cannot, address Petitioner's argument that *Jacobson* changed the law with respect to what constitutes evidence of predisposition. Commission of a crime, where there has been inducement, will no longer in and of itself be evidence of predisposition as it was in the Fifth Circuit prior to *Jacobson*. Instead of countering Petitioner's argument, the Government asserts for the first time in this Court its argument that Mr. Arditti was not induced to commit this offense.

MISSTATEMENTS IN THE GOVERNMENT'S STATEMENT OF FACTS

1. The Government, in explaining Mr. Arditti's introduction to the undercover agent, states that: "Gallman later asked Yañez to recommend an attorney who could handle their financial transactions." Brf. Opp. at 3. While this fits with the Government's theory that Mr.

Arditti was recommended for participation in this offense, the record reveals otherwise.

The transcript of the conversation in question reflects the following:

> Adams: Gabriel, I may have like . . . I may have some, the business that I want to do in El Paso, and if I had any problem with it, is there somebody there, or would this guy[1] be somebody that, that if I had problems I can, get ahold of him through you or just . . .
>
> Yañez: Like a, lawyer or . . .
>
> Adams: Un-huh.
>
> Yañez: Oh yeah.
>
> Adams: Well this guy[2] doesn't do any criminal work.

Government's Exhibit (GE) 23-B at 16-18.

Mr. Yañez then mentions Mr. Arditti's name, as well as several other El Paso criminal defense attorneys. Yañez testified that he understood Agent Gallman to be requesting an introduction to a criminal defense lawyer (XIII R. 647). Even Gallman testified that in this conversation there was no "meeting of the minds of who we were talking about." (VIII R. 196).

---

[1] It is clear from prior conversation that Gallman is referring to the commercial lawyer who assisted them with the offshore corporation and bank account.

[2] See note 1.

That Yañez recommended Arditti only for criminal defense work, not money laundering, is further supported by the conversation at the next taped meeting, where Yañez specifically tells the agent that Arditti was not recommended by him to help with investments (GE 33A at 25). Gallman testified at trial that it was clear to him that Yañez wanted him to use Arditti for criminal defense matters only (XII R. 451).

2. The Government states that at the September 21, 1988, meeting, Yañez said that he had told Arditti "about the two prior laundering transactions." Brf. Opp. at 3. Yañez states at that meeting that he told Arditti that "we have done two transactions." GE 29A at 4. Mr. Yañez does not mention money laundering to Mr. Arditti.

3. The Government states "Gallman identified several drug dealers with whom he claimed to have been involved . . . ." Brf. Opp. at 3. There is no citation for this statement, and it is not found in the transcript of the conversation in question (GE 29A). In fact, it is Mr. Arditti in detailing his credentials as a criminal defense lawyer, who mentions past clients who were drug dealers (GE 29A at 6).

4. The Government states that all of the meetings between Mr. Arditti and the agent were videotaped. Brf. Opp. at 3, n.1. This is incorrect. The March 30th meeting was not videotaped. It was only partially audiotaped. This is significant because the agent claimed at trial, though not before, that he told Mr. Arditti, in this unrecorded part of the conversation, that the funds were "coke money" and Mr. Arditti could walk away from it (X R. 246-48; Pet. App. at 7).

5. The Government states that at that first meeting, Arditti "advised [the agent] on structuring real estate transactions so as to avoid arousing suspicion. . . . and bypass the banking system with owner financing." Brf. Opp. at 4.

The true conversation that took place is not so simple, and is set forth in the Petition at 7. Most important is Agent Gallman's trial testimony, where he agreed that Arditti's owner financing suggestion did not appear to be a money laundering scheme (XII R. 443-44).

6. The Government states that at the end of the March 30th meeting, "petitioner confirmed that he had 'no qualms, no qualms at all.'" Brf. Opp. at 5. Although the opinion below is cited, this does not appear in the court's opinion. Instead it is the identical misstatement that appeared in the Government's brief below.

Mr. Arditti's quoted remark was made at the *May 2nd* meeting (GE 69-B at 100), in the following context:

Adams: I assume when I come back next week you can present me a bill or something and we'll take care of that.

Arditti: That's right. Absolutely.

Adams: You know I'm good for that. Gabriel knows.

Arditti: Okay.

Adams: Okay?

Arditti: I've got no qualms. None whatsoever.

Not only did the Government attribute this quote to the wrong conversation, it also misleads this Court by

taking it out of the context of the actual conversation. It is clear from the tape that Mr. Arditti has no qualms about presenting a bill, not about the purported illegal source of Agent Gallman's funds.

ARGUMENT

The Government insists that this Court's holding in *Jacobson v. United States*, 112 S.Ct. 1535 (1992), had no impact on the state of the law of entrapment in the Fifth Circuit. Mr. Arditti disagrees, and believes that his case should be considered in light of *Jacobson*.

The two important points made in *Jacobson* that break from prior Fifth Circuit law and impact this case are: (1) the Court held that evidence of predisposition must be evidence of an intent to commit an offense, not simply suspicious behavior; and (2) the Court held that the manner of the defendant's participation in the offense is not relevant if it is *after* inducements by Government agents.

The Fifth Circuit found that Mr. Arditti "jumped in with both feet" and was an "eager, active participant." Pet. App. at 27. The Government relies on those findings without regard to how *Jacobson* may have changed those findings.

It is true that Mr. Arditti made several comments to the undercover agent at the first meeting that could be viewed, in the light most favorable to the Government, as suspicious. However, the Government cannot assert that anything said by Mr. Arditti indicated a desire to commit an illegal act. In fact, the Government acknowledged this

fact in the court below, but argued that the absence of incriminating statements was due to Mr. Arditti's savvy as a criminal defense lawyer, rather than his true lack of desire to commit a crime. Gov't C.A. Br. at 41.

Under the Court's holding in *Jacobson*, statements that are suspicious but do not indicate a willingness to commit an offense are *not* evidence of predisposition. The Fifth Circuit, had it the benefit of the Court's holding in *Jacobson*, would have had to look for evidence of predisposition to commit a criminal offense, which it would not have found in the record.

Further, the Fifth Circuit's finding that Mr. Arditti was an eager and active participant is unreliable because it was based on pre-*Jacobson* law. Mr. Arditti was an eager and active participant in conversations with the undercover agent – obviously he was hoping to get hired in a criminal matter. He jumped into meetings with the agent, again hoping to get legitimate business from the contact. But once the illegal scheme was suggested to Mr. Arditti, it took two and one half months of nagging and pressure from the Government to induce Mr. Arditti to commit the offense.

Jacobson makes it clear that the eventual willing and active commission of a crime, after lengthy inducements by the Government, will not be evidence of predisposition. Just as Mr. Jacobson's eventual purely voluntary purchase of a pornographic magazine could not be bootstrapped to be used as evidence of predisposition, neither can Mr. Arditti's ultimate commission of an offense be considered evidence of predisposition.

Contrary to the Government's assertion, prior Fifth Circuit law is changed by the holding in *Jacobson*. The Fifth Circuit held in *United States v. Johnson*, 872 F.2d 612 (5th Cir. 1989), and *United States v. Nations*, 764 F.2d 1073 (5th Cir. 1985), that predisposition could be inferred from the defendant's ultimate active and eager participation in the offense. This is no longer the case. The Court, in *Jacobson*, recognized that predisposition can be bred by the Government's actions. In *Jacobson*, it was the Government's mailings that were held to have bred the predisposition in Mr. Jacobson. In the present case, it was the much more influential and insidious personal meetings with the agent, and personal contacts by the codefendant (which were made at the agent's behest) that bred the predisposition in Mr. Arditti.

Rather than address the impact of *Jacobson* in this case, the Government has taken the tack *for the first time* that Mr. Arditti was not induced to commit the offense. The Government asserts that Mr. Arditti was merely provided an opportunity to commit the offense. Brf. Opp. at 14, 15. The Government made no such assertion in the court of appeals, nor did the lower court make any such finding. The entire argument has always been whether the government presented sufficient evidence of predisposition, because it has been clear to all parties that Mr. Arditti was induced to commit the offense.

CONCLUSION

The jury could not have inferred, as the Government suggests (Brf. Opp. at 13), that Yañez' introduction of Mr.

Arditti to the undercover agent indicated Yañez' knowledge that Arditti would commit an offense, and therefore was evidence of predisposition. This assertion is based only on the misstatement of facts which are corrected above. Absent that one fact, there is no evidence of predisposition, as that evidence is characterized in *Jacobson*, prior to the agent's contact and inducements.

Rather than address the impact of this Court's holding in *Jacobson*, the Government urges two extraordinary points: (1) it argues that the Court's holding in *Jacobson* has no impact on the law of entrapment in the lower courts; and (2) it asserts for the first time that Mr. Arditti was not induced to commit the offense.

The Government's arguments have no merit and this petition for writ of certiorari should be granted.

Respectfully submitted,

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